No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENNETH S. GELLER
Assistant to the Solicitor General

KATHERINE WINFREE
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Cases--Continued — Page

Cases—Continued — Page

Cases—Continued — Page

Statutes and rules: — Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 577 F.2d 372. The memorandum opinion of the district court (Pet. App. 15a-23a) is reported at 423 F. Supp. 537.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on June 12, 1978. A petition for rehearing was denied on August 7, 1978 (Pet. App.

14a). On October 26, 1978, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including November 16, 1978. The petition was filed on November 3, 1978, and was granted on January 8, 1979 (App. 27). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may obtain collateral relief from his conviction under 28 U.S.C. 2255 solely because the district court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

At the time of respondent's guilty plea, Rule 11 of the Federal Rules of Criminal Procedure provided:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty,

> and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequence of the plea.

Rule 11(c) now provides:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT

1. A 19-count indictment filed on May 19, 1972, in the United States District Court for the Eastern District of Michigan charged respondent and 21 co-defendants with conspiracy to manufacture and distribute, and to possess with intent to distribute, heroin, cocaine, LSD, and other controlled substances, in violation of 21 U.S.C. 846, and with various substantive narcotics offenses, in violation of 21 U.S.C. 841(a)(1) and 843(b). On May 24, 1974, pursuant to a plea bargain whereby the remaining charges against him would be dismissed and the government would not prosecute him for a bail violation, respondent offered to plead guilty to the conspiracy count of the indictment.

At the outset of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Procedure, the prosecutor disclosed the existence and terms of the plea agreement (App. 2). The district court then questioned respondent and determined that he was not suffering from any physical or mental impairment, that he was fully aware of what he was doing, and that he understood the constitutional rights

that he would waive by pleading guilty (App. 3-4). The court informed respondent that he could be sentenced to a maximum of 15 years' imprisonment and a $25,000 fine if the plea were accepted,[1] but it failed to mention that respondent would also be subject to a mandatory special parole term of at least three years.[2]

---

[1] The pertinent colloquy was as follows (App. 4-5):

THE COURT: Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of imprisonment?
THE DEFENDANT: No, sir.
THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?
THE DEFENDANT: I have now, yes.
THE COURT: Now you know?
THE DEFENDANT: Yes, sir.

* * * * *

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.
THE DEFENDANT: Yes, sir.
THE COURT: You understand that?
THE DEFENDANT: Yes, sir.

[2] Section 401(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1261, 21 U.S.C. 841(b), provides that persons convicted of a violation of the Act must be given a term of "special parole," in addition to any other sentence imposed. The special parole term, which must be at least two, three, or four years in length (depending on the nature of the offense) and which may be as long as life (see, *e.g.*, *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Rivera-Marquez*, 519 F.2d 1227, 1228-1229

After the court outlined the nature of the charges, respondent explained his involvement in the conspiracy and confessed to his guilt (App. 6-8). Respondent acknowledged that he had not been forced or threatened to plead guilty and that no promises had been made in exchange for the plea other than those contained in the plea bargain (App. 9). Respondent's counsel advised the court that he was satisfied that there was a factual basis for the plea and that respondent knew "full well the consequences of a guilty plea * * *" (App. 9). The court then accepted respondent's plea of guilty, finding that the plea was entered voluntarily with a full understanding of its possible consequences and was supported by a factual basis (App. 9-10). Thereafter, on September 19, 1974, respondent was sentenced to 10 years' imprisonment, to be followed by five years' special parole, and to a $5,000 fine.

2. Respondent did not appeal. Approximately two years after sentencing, on August 10, 1976, respond-

---

(9th Cir.), cert. denied, 423 U.S. 949 (1975); *United States* v. *Rich*, 518 F.2d 980, 987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976)), "is separate from and begins *after* the usual sentence terminates, including any period of supervision. In the event an individual should violate during the period of supervision prior to the beginning of the SPT [Special Parole Term], he will be returned as a violator of the basic period of supervision with the SPT still to follow unaffected." Bureau of Prisons Policy Statement 7500.43 at 2 (January 18, 1973). If a defendant violates the conditions of special parole, he may be returned to prison to serve the entire special parole term, not merely the unexpired portion. 21 U.S.C. 841(c).

ent moved to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that the district court had violated Rule 11, Fed. R. Crim. P., by failing to inform him of the mandatory special parole term at the time his plea was entered. The motion did not assert that respondent had actually been unaware of the special parole provision or that, if he had been notified of it by the trial judge, he would not have pleaded guilty.[3]

The district court held a hearing on respondent's Section 2255 motion on September 8, 1976. At the hearing, respondent's counsel stated that he could not recall whether he had discussed the special parole term with respondent prior to entry of his guilty plea (App. 20), but he did acknowledge that, before a client pleaded guilty, it was his practice to review with the client the possible sentences that could be imposed (App. 20-21). Counsel also admitted that he had represented to the court at the Rule 11 proceeding that respondent was fully aware of the consequences of his plea (App. 22-23).

The district court denied respondent's motion to vacate sentence. Although it agreed that the record of the guilty plea proceeding did not reflect that respondent had been told of the mandatory special parole provisions (Pet. App. 16a), the court con-

---

[3] Respondent's motion was initially filed as part of the criminal proceedings. On September 13, 1976, respondent filed an "Amended Motion to Vacate Guilty Plea," bearing the civil number assigned to the case and designating himself as plaintiff and the United States as defendant (App. 11-13). The motion was otherwise unchanged.

cluded that respondent had not been prejudiced by the omission and that he therefore was not entitled to collateral relief from his conviction. The court observed that respondent's total sentence did not exceed the maximum sentence that he was informed he could receive as a result of his guilty plea (*id.* at 18a). In addition, the court found that respondent's plea had been entered voluntarily and that the technical defect had not influenced the plea or resulted in any fundamental unfairness (*id.* at 22a). In making this determination, the court expressly relied on defense counsel's assurance at the Rule 11 proceeding that he had advised respondent about the possible consequences of his guilty plea and on the fact that two years had elapsed between respondent's sentencing, when the Rule 11 violation should have been apparent to him and his attorney, and the filing of the Section 2255 motion (*id.* at 22a n.3).

3. The court of appeals reversed and remanded with instructions to vacate the sentence entered upon the guilty plea and to allow respondent to plead anew. Finding that the district court's ruling was "squarely contrary" to *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975), the court of appeals held that the mandatory special parole term was a direct consequence of a guilty plea, that the district court had therefore violated Rule 11 in failing to advise respondent of that consequence of his plea, and that (relying on *McCarthy* v. *United States*, 394 U.S. 459 (1969)) the proper remedy for such noncompliance

was to allow respondent to withdraw the plea (Pet. App. 1a-12a).

The court recognized (Pet. App. 10a) that *McCarthy* involved a *direct* appeal from a conviction entered upon a guilty plea and that this Court had subsequently remarked in *Davis* v. *United States*, 417 U.S. 333 (1974), that the failure to comply with the formal requirements of a rule of criminal procedure does not warrant *collateral* relief absent a showing of " 'a fundamental defect which inherently results in a complete miscarriage of justice' " (417 U.S. at 346, quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). It further acknowledged that "at first blush the Rule 11 violation at issue here does not seem to rise to the level" required to satisfy the *Davis* test (Pet. App. 9a). The court resolved the conflict by holding that prejudice inheres in every failure to comply with Rule 11 and that such claims are therefore cognizable in a Section 2255 proceeding (*id.* at 10a).

SUMMARY OF ARGUMENT

A district court's failure to observe the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting a defendant's guilty plea is a defect cognizable only on direct appeal, not on collateral attack.

A. The writ of habeas corpus has traditionally been available to test the legality of confinement. At the time the Constitution was adopted, however, the writ could be used solely to verify the jurisdiction of

the sentencing court. Construing the habeas corpus provisions of the Judiciary Act of 1789 in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830), Chief Justice Marshall wrote that "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

An expansion of the statutory language in 1867, together with emerging concepts of due process in criminal proceedings, eventually led the Court to discard the concept of jurisdiction as the touchstone for access to federal post-conviction relief and to acknowledge that such relief is available for claims of "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942). As the Court remarked in *Fay* v. *Noia*, 372 U.S. 391, 409 (1963), "[t]he course of decisions * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction."

The present federal habeas corpus statute, 28 U.S.C. 2255, allows a prisoner to assert not only constitutional and jurisdictional claims, but also claims founded upon "the laws of the United States." By contrast to the steady expansion of the substantive scope of the writ in regard to constitutional claims, however, "there has been no change in the established

rule with respect to nonconstitutional claims" (*Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976)), which is that "the writ of habeas corpus is not designed for collateral review of errors committed by the trial court" and "will not be allowed to do service for an appeal" (*Sunal* v. *Large*, 332 U.S. 174, 178, 179 (1947)).

Hence, the Court has repeatedly emphasized that "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *." *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 428-429 (1962).

B. Respondent's Section 2255 motion, which is based solely upon a technical violation of Rule 11, does not raise the sort of claim cognizable on collateral attack. The failure to inform respondent of the special parole provisions at the time of his guilty plea did not implicate any constitutional rights or jurisdictional defects and amounted to no more than a violation of a rule of criminal procedure. Moreover, it is not manifestly unjust to hold respondent to his plea. His motion to vacate sentence did not allege that he was actually unaware of the special parole pro-

visions, much less that he would not have pleaded guilty if he had been fully informed of this consequence of his plea, and the district court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea bargain. In addition, respondent's sentence, even with the inclusion of five years' special parole, does not exceed the term of imprisonment that he was advised he could receive if he pleaded guilty.

Finally, respondent's Section 2255 motion does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). Since the trial judge's failure to follow Rule 11 should have been immediately apparent to respondent and his counsel at sentencing, this is not a case where "the facts relied on were dehors the record and therefore not open to consideration and review on appeal." *Sunal* v. *Large*, *supra*, 332 U.S. at 177.

The strong societal interest in the finality of judgments suggests that, in this situation, respondent should have challenged the Rule 11 error on direct appeal or not at all. Permitting a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceeding for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution on the underlying offense may be difficult or impossible. As the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

ARGUMENT

A DEFENDANT IS NOT ENTITLED TO COLLATERAL RELIEF FROM HIS CONVICTION UNDER 28 U.S.C. 2255 MERELY BECAUSE THE DISTRICT COURT VIOLATED RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ACCEPTING HIS GUILTY PLEA

In *McCarthy* v. *United States*, 394 U.S. 459, 472 (1969), this Court held that "a defendant whose plea has been accepted in violation of Rule 11 [of the Federal Rules of Criminal Procedure] should be afforded the opportunity to plead anew * * *." It is undisputed that, at the time he pleaded guilty, respondent was not advised of the mandatory special parole term, which we acknowledge to be a "consequence of the plea."[4] In reliance on *McCarthy*, the

[4] Respondent's guilty plea was entered under the 1966 version of Rule 11, which required the district court to determine that the defendant understood "the consequences of the plea." Effective December 1, 1975, Rule 11(c)(1) was amended to require the court, before accepting a plea of guilty or nolo contendere, to inform the defendant on the record of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law * * *." This change was intended to eliminate confusion over what is a direct "consequence" of a guilty plea. See Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 Yale L. J. 1395, 1397 n.9 (1977). As the Advisory Committee re-

court of appeals concluded that the omission entitled respondent to vacate his conviction under 28 U.S.C. 2255 and to plead anew (Pet. App. 3a-4a).

The court of appeals' decision ignores the essential distinction between direct and collateral attacks upon a conviction. The ruling in *McCarthy* was announced in the context of a direct appeal from a conviction entered after a guilty plea proceeding conducted in gross disregard of the requirements of Rule 11. Respondent, by contrast, did not appeal his conviction. Instead, he raised the Rule 11 violation for the first time years later on a motion to vacate sentence pursuant to Section 2255, which permits a federal prisoner to assert a claim that his confinement is "in violation of the Constitution or the laws of the United States." Because of the "strong interest in preserving the finality of judgments" (*Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977)), the crucial question in a

marked, "[t]he objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty." 62 F.R.D. 271, 279 (1974). Hence, we do not dispute that failure to notify a defendant pleading guilty to a controlled substance offense of the mandatory special parole term would constitute a violation of the new Rule 11. See *United States* v. *Del Prete*, 567 F.2d 928, 929 (9th Cir. 1978). But see *United States* v. *Broussard*, 582 F.2d 10, 12 (5th Cir. 1978), cert. denied, No. 78-915 (Feb. 26, 1979); *United States* v. *Adams*, 566 F.2d 962, 969 (5th Cir. 1978).

proceeding under Section 2255 is not whether "errors of law [were] committed by the trial court" but whether the defendant's confinement offends the Constitution (*Sunal* v. *Large*, 332 U.S. 174, 179, 181-182 (1947)) or otherwise presents "exceptional circumtances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). Thus, merely because the district court's failure to comply with the requirements of Rule 11 might have permitted respondent to withdraw his plea if the defect had been raised on direct appeal,[5] it does not follow that the same relief should be available in a collateral attack on the conviction.

A. A Failure to Comply with the Formal Requirements of a Federal Rule of Criminal Procedure, Without More, Is Not Cognizable under 28 U.S.C. 2255

This Court has frequently had occasion to examine the common-law scope of the writ of habeas corpus and its historical development in England and the United States.[6] See, *e.g.*, *Wainwright* v. *Sykes*, 433

[5] Although the Court need not reach the issue in this case, we question whether the technical Rule 11 defect involved here, which resulted in no prejudice to respondent, should require a court to set aside respondent's guilty plea even on direct appeal. See page 33 note 19, *infra*.

[6] As "the modern postconviction procedure available to federal prisoners" (*Stone* v. *Powell*, 428 U.S. 465, 479 (1976)), 28 U.S.C. 2255 is intended to provide a remedy "exactly commensurate with that which had previously been available by habeas corpus" (*Hill* v. *United States*, 368 U.S. 424, 427

U.S. 72, 77-80 (1977); *Stone* v. *Powell*, 428 U.S. 465, 474-482 (1976); *Kaufman* v. *United States*, 394 U.S. 217, 221-224 (1969); *Fay* v. *Noia*, 372 U.S. 391, 399-415 (1963); *United States* v. *Hayman*, 342 U.S. 205, 210-213 (1952). Although the appropriate scope of the writ in modern times has been the subject of some dispute both within the Court [7] and among legal commentators [8] and cannot easily be compressed into a rigid rule or set formula, it is apparent from even a brief review of the Court's decisions that the reach of Section 2255 has never been thought to extend to claims such as that respondent has presented in this case.

1. At the time the Constitution was adopted, the rule at common law was that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other

(1962)) "and has been construed in accordance with that design" (*Blackledge* v. *Allison*, 431 U.S. 63, 74 n.4 (1977)). See *United States* v. *MacCollom*, 426 U.S. 317, 322 (1976); *Davis* v. *United States*, 417 U.S. 333, 343-344 (1974).

[7] See, *e.g.*, *Davis* v. *United States*, *supra*, 417 U.S. at 350-368 (Rehnquist, J., dissenting); *Fay* v. *Noia*, *supra*, 372 U.S. at 448-476 (Harlan, J., dissenting); *Sunal* v. *Large*, *supra*, 332 U.S. at 184-187 (Frankfurter, J., dissenting).

[8] See, *e.g.*, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965); Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970). See also P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System*, ch. X, at 1424-1538 (2d ed. 1973).

than to certify the formal jurisdiction of the committing court." Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966). As the Court stated in *United States* v. *Hayman*, *supra*, 342 U.S. at 210-211:

> Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.

The early decisions of this Court reflected a similar understanding. See *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 44-45 (1822); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-203 (1830); *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833); *Ex parte Yerger*, 75 U.S. (8 Wall.), 85, 101 (1868). See also *Frank* v. *Mangum*, 237 U.S. 309, 329-331 (1915).[9]

[9] In *Ex parte Siebold*, 100 U.S. 371 (1879), the scope of habeas corpus was broadened to include claims that the defendant had been convicted under an unconstitutional statute. However, the Court was careful, to use Judge Friendly's phrase, "to kiss the jurisdictional book." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970). "[I]f the laws are unconstitutional and void," Justice Bradley wrote in *Siebold*, "the Circuit Court acquired no jurisdiction of the causes." 100 U.S. at 377. Indeed, as late as 1938 the Court felt the need to justify the grant of habeas corpus relief to a defendant who had been convicted without the assistance of counsel by stating that "compliance with [the Sixth Amendment's] mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 467.

In 1867, Congress expanded the statutory language so as to make the writ available to state as well as federal prisoners. Act of February 5, 1867, ch. 28, 14 Stat. 385. Under this statute, federal courts were authorized to grant relief in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States * * *." Although the limitation of federal habeas corpus to considerations of jurisdiction continued to persist for some time, the broadened language of the 1867 statute, together with emerging concepts of due process, led the Court eventually to acknowledge that "the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942). See *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Walker* v. *Johnson*, 312 U.S. 275 (1941); *Adams* v. *United States ex rel McCann*, 317 U.S. 269 (1942); *House* v. *Mayo*, 324 U.S. 42 (1945); *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Price* v. *Johnston*, 334 U.S. 266 (1948); *Brown* v. *Allen*, 344 U.S. 443 (1953). The Court reviewed this background in *Fay* v. *Noia*, 372 U.S. 391 (1963), and

concluded that "[t]he course of decisions * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction." *Id.* at 409 (footnote omitted).

Section 2255, of course, allows a prisoner to assert not only constitutional and jurisdictional claims, but also claims founded upon "the laws of the United States." However, by contrast to the steady expansion of the substantive scope of the writ in regard to constitutional claims, "there has been no change in the established rule with respect to nonconstitutional claims" (*Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10), which is that "[t]he writ of habeas corpus * * * 'will not be allowed to do service for an appeal' " (*ibid.*, quoting *Sunal* v. *Large*, *supra*, 332 U.S. at 178). Because "the writ is not designed for collateral review of errors of law committed by the trial court * * *" (*Sunal* v. *Large*, *supra*, 332 U.S. at 179), "not * * * every asserted error of law can be raised on a § 2255 motion." *Davis* v. *United States*, *supra*, 417 U.S. at 346. In general, "nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10. See also *Davis* v. *United States*, *supra*, 417 U.S. at 345-346; *Kaufman* v. *United States*, *supra*, 394 U.S. at 223 n.7; *Sunal* v. *Large*, *supra*, 332 U.S. at 178-179.

In *Sunal* v. *Large*, *supra*, for example, two defendants were found guilty of failing to submit to induc-

tion into the Army, but neither appealed his conviction. Nine months later, this Court held in *Estep* v. *United States*, 327 U.S. 114 (1946), that the statutory defense that the district court had barred the defendants from raising at trial should have been allowed. Defendants immediately sought relief under Section 2255, but the Court held that the error was correctable only by direct appeal, not on collateral attack.[10] In denying habeas corpus relief, Justice Douglas observed for the Court (332 U.S. at 182):

> Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.

The Court reemphasized these important principles in *Hill* v. *United States*, 368 U.S. 424 (1962). There the question presented was "whether a district court's failure explicitly to afford a defendant an opportunity

---

[10] Even the dissenting Justices in *Sunal* agreed that trial errors ordinarily would not fall within the scope of habeas corpus and that the writ should be reserved for instances in which it is necessary "to prevent a complete miscarriage of justice." 332 U.S. at 187 (Frankfurter, J., dissenting); *id.* at 188 (Rutledge, J., dissenting).

to make a statement at the time of sentencing furnishe[d], without more, grounds for a successful collateral attack upon the judgment and sentence." *Id.* at 426 (footnote omitted). Although the right of allocution was expressly guaranteed to a defendant by Rule 32(a) of the Federal Rules of Criminal Procedure and was deemed to be an ancient and valuable one (*Green* v. *United States*, 365 U.S. 301, 304 (1961)), and although a violation of Rule 32(a) necessitated vacation of the sentence when raised on direct appeal (*Van Hook* v. *United States*, 365 U.S. 609 (1961)), the Court denied relief under Section 2255, holding that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 368 U.S. at 429 (footnote omitted). The Court explained (*id.* at 428):

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of *habeas corpus*. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Bowen v. Johnston*, 306 U.S. 19, 27.

See also *Machibroda* v. *United States*, 368 U.S. 487, 489 (1962).

This standard was applied most recently in *Davis* v. *United States*, *supra*, which involved a change in the substantive law applicable to the defendant's case, rather than a procedural error. Although the Court expressly reaffirmed the traditional limitation on the scope of habeas corpus for nonconstitutional errors (417 U.S. at 346), it held that "[t]here can be no room for doubt that" the claim of an intervening change in law, under which the act for which the defendant had been convicted was no longer criminal, constitutes "a circumstance [that] 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347.[11]

These decisions clearly indicate that while Section 2255 encompasses claims of legal, as well as jurisdictional and constitutional, error, the applicable standard is no less stringent than the notion of fairness embodied in the Due Process Clause. Under the test articulated in *Hill*, a conviction entered on the basis of a procedural error sufficiently serious to be characterized as "a fundamental defect which inherently results in a complete miscarriage of justice" would approach or amount to a deprivation of due process and would justify habeas corpus relief. And

[11] *Davis* distinguished *Sunal* on the grounds that the defendants in *Sunal* had not appealed their convictions and that *Sunal* was not a case in which the law had changed after the time for appeal had expired. 417 U.S. at 345. As we discuss below (see pages 26, 33-36, *infra*), this case resembles *Sunal* on both scores.

Davis merely applied the same "standard * * * to substantive matters not protected by the Constitution." *Bachner* v. *United States*, 517 F.2d 589, 598-599 (7th Cir. 1975) (Stevens, J., concurring). At all events, the appropriate inquiry on collateral attack is not whether an error of law may have been committed, as would be the case on direct review, but whether the "resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154.

3. The policy reasons that underlie the distinction in post-conviction remedies between constitutional and nonconstitutional claims are not difficult to perceive. Resort to the writ "results in serious intrusions on values important to our system of government [including] the most effective utilization of limited judicial resources [and] the necessity of finality in criminal trials * * *." *Stone* v. *Powell*, *supra*, 428 U.S. at 491 n.31.[12] While the consideration of finality of judgments has different force in civil and criminal contexts, it is in basic harmony with the goals of deterrence and rehabilitation embodied in the criminal justice system:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the

[12] See generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, *supra*, 38 U. Chi. L. Rev. at 146-151; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, *supra*, 76 Harv. L. Rev. at 444-453.

> law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring). See *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

Habeas corpus proceedings also drain scarce community legal resources, including judges, prosecutors, appointed defense counsel and even courtrooms:

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

Schneckloth v. *Bustamonte*, *supra*, 412 U.S. at 260-261 (Powell, J., concurring) (footnotes omitted). Finally, because collateral attack may be long delayed, it is frequently difficult to determine with reliability the factual issue giving rise to the attack. Cf. Rule

9(a), Rules Governing Section 2255 Proceedings, 28 U.S.C. 2255. And although a successful attack generally entitles the defendant only to a retrial, a long delay often makes another trial impossible because witnesses may die, memories may fade, or evidence may be lost or released. See *Peyton* v. *Rowe*, 391 U.S. 54, 62-63 (1968).

While society may be willing to incur these costs in order to correct errors of constitutional magnitude or to benefit a prisoner who has been "grievously wronged" (*Fay* v. *Noia*, *supra*, 372 U.S. at 441), where "the writ is the only effective means of preserving his rights" (*Waley* v. *Johnston*, *supra*, 316 U.S. at 104-105), the competing considerations outlined above surely dictate a contrary result in cases of nonconstitutional violations, especially when those violations could have been challenged on direct appeal. In sum, " 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis* v. *United States*, *supra*, 417 U.S. at 346, quoting *Hill* v. *United States*, *supra*, 368 U.S. at 429.

B. The Rule 11 Violation in This Case Does Not Entitle Respondent to Relief under 28 U.S.C. 2255

1. Viewed against the background of the scope of habeas corpus, it is apparent that respondent's Section 2255 motion, which was based solely on a technical violation of Rule 11 without any allegation or proof of prejudice, does not raise the sort of claim that may

be recognized on collateral attack. A claim of this nature does not relate to rights protected by the Constitution, but rather is founded in the "laws of the United States," here, the procedures set forth in Rule 11. See App. 11. Moreover, because "[t]he error was of record," it does not present "a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal." *Sunal* v. *Large*, *supra*, 332 U.S. at 177. Compare *Waley* v. *Johnston*, *supra*, 316 U.S. at 104. Nor is this a case where "the law was changed after the time for appeal had expired." *Sunal* v. *Large*, *supra*, 332 U.S. at 181. See *Davis* v. *United States*, *supra*, 417 U.S. at 346-347. Accordingly, respondent's objection amounts to no more than a "nonconstitutional claim that could have been raised on appeal, but [was] not," and therefore "may not be asserted in collateral proceedings." *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10.[13]

[13] This conclusion is supported by the decisions of six courts of appeals which, in reliance on *Davis* and *Hill*, have held that a defendant may not obtain Section 2255 relief merely because the district court violated Rule 11 in accepting his guilty plea. See, *e.g.*, *Keel* v. *United States*, 585 F.2d 110 (5th Cir. 1978) (en banc); *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978); *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), cert. denied, 434 U.S. 834 (1977); *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977); *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Cf. *Horsley* v. *United States*, 583 F.2d 670 (3d Cir. 1978) (adopting the *Hill* and *Davis* standard but holding that the failure adequately to inform a defendant of the nature of the charges against him, unlike a failure to mention the maximum possible punishment, is inherently prejudicial).

Although the First and Ninth Circuits have granted Section 2255 relief in circumstances similar to this case (see *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977)), neither court of appeals analyzed the issue in terms of the distinction between direct and collateral attack (see *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 111 n.8), and subsequent decisions in each circuit strongly suggest that the courts might reach a contrary result if the issue were again presented. See *United States* v. *Tursi*, 576 F.2d 396, 399 (1st Cir. 1978); *Marshall* v. *United States*, 576 F.2d 160, 162 (9th Cir. 1978); *Hitchcock* v. *United States*, 580 F.2d 964, 966 (9th Cir. 1978). Thus, the Sixth Circuit is the only court of appeals to have acknowledged the difference between a direct and collateral attack on a guilty plea, to have found that the defendant suffered no prejudice as a result of a Rule 11 violation, and then to have granted Section 2255 relief.

We do not suggest, of course, that contentions relating to the taking of a guilty plea may never be asserted in a Section 2255 motion. A defect in the Rule 11 proceeding that is "fundamental" and that "inherently results in a complete miscarriage of justice" or presents "exceptional circumstances where the need for the remedy afforded by the unit of habeas corpus is apparent" would justify collateral relief. For example, where, as here, the violation relates to the trial judge's failure to notify the defendant of the mandatory special parole provisions, prejudice sufficient to warrant habeas corpus relief would be demonstrated by a showing that the defect in fact rendered the plea involuntary (for example, if the defendant would not have pleaded guilty had he been

aware of the special parole term)[14] or that it would be manifestly unfair, in light of the absence of an express warning about special parole, to hold him to his plea (for example, if the sentence imposed, with the addition of the period of special parole, exceeded the maximum sentence that the defendant was told he could receive).[15] See *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 111; *Bachner* v. *United States*, *supra*, 517 F.2d at 597.

Respondent's allegations satisfied neither of these tests. His motion to vacate sentence did not allege that he was actually unaware of the special parole provisions, much less that he would not have pleaded guilty if he had been fully informed at the Rule 11 proceedings of the consequences of his plea (see App. 11-13). Although the memorandum of law submitted in support of respondent's Section 2255 motion stated that "[d]efendant did not know of the mandatory special parole term" (App. 16), this allegation, unlike the contents of the motion, was not verified, and respondent did not offer to submit an affidavit

[14] A conviction entered upon an involuntary plea of guilty is subject to collateral attack. See *Henderson* v. *Morgan*, 426 U.S. 637, 645 (1976); *Fontaine* v. *United States*, 411 U.S. 213 (1973); *Machibroda* v. *United States*, *supra*, 368 U.S. at 493.

[15] In that circumstance, the proper remedy under Section 2255 would be to reduce the defendant's sentence to comport with the information he was given at the time of his plea. See *Richardson* v. *United States*, 577 F.2d 447, 452 (8th Cir. 1978), petition for cert. pending, No. 78-5263. Cf. *United States* v. *Sheppard*, 588 F.2d 917, 918 (4th Cir. 1978). Section 2255 allows a court, upon finding that "the sentence imposed was * * * open to collateral attack," to "correct the sentence as may appear appropriate."

to support the assertion. The allegation was suspect, in any event, in light of counsel's representation at the Rule 11 proceeding that he had explained to respondent the consequences of the plea (App. 9) and his acknowledgment at the hearing on respondent's motion to vacate sentence that, before a client pleaded guilty, it was his practice to explain to the client the possible sentences that could be imposed (App. 20-21).

The district court concluded that, "under that state of affairs," it could "infer that [the special parole term] was known to [respondent]" at the time of his plea (App. 23). More important, the court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea agreement (Pet. App. 22a).[16] The court of appeals did not disturb this factual determination, which is amply supported by the record. As the Seventh Circuit has observed:

> Unlike ineligibility for parole, which "automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances," the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole.

[16] The district court remarked (App. 26): "I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, 'You will be subjected to a parole term of at least three years,' as far as his guilty plea is concerned. * * * And what he was interested in, I'm sure, was what the term in prison would be."

> It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be to assume that he would be influenced by other contingencies he is not advised about.

Bachner v. *United States*, *supra*, 517 F.2d at 597 (citation omitted). See also *Johnson* v. *Wainwright*, 456 F.2d 1200, 1201 (5th Cir. 1972) (likelihood that district court's mention of parole term would cause a defendant to change his decision to plead guilty "is so improbable as to be without legal significance"). Finally, as the district court noted (Pet. App. 18a), respondent's sentence of 10 years' imprisonment and five years' special parole was no greater—indeed, was materially less, for all practical purposes—than the term of 15 years' imprisonment that he was advised he could receive if he pleaded guilty. See *United States* v. *Turner*, 572 F.2d 1284, 1285 (8th Cir. 1978); *Bell* v. *United States*, 521 F.2d 713, 715 (4th Cir. 1975), cert. denied, 424 U.S. 918 (1976).

2. In these circumstances, with no finding that the district court's technical noncompliance with one aspect of Rule 11 rendered respondent's plea either involuntary or so unfair as to be "a complete miscarriage of justice," respondent was not entitled to relief under Section 2255. Indeed, the court of appeals conceded that the violation at issue here could not satisfy the traditional standard for issuance of the writ of habeas corpus (Pet. App. 9a). Nonetheless,

in an attempt to reconcile what it viewed as "somewhat contradictory language" in this Court's decisions restricting the scope of collateral attack for nonconstitutional errors in *Davis* and demanding strict adherence to the requirements of Rule 11 in *McCarthy* (*ibid.*), the court below concluded that "a Rule 11 violation is per se prejudicial and thus must be a 'fundamental defect which inherently results in a complete miscarriage of justice' " (*id.* at 10a-11a). Contrary to the court of appeals assumption, there is no tension between the standards for Section 2255 relief articulated in *Hill* and *Davis* and the prophylactic rule announced in *McCarthy* for noncompliance with Rule 11.

McCarthy, it bears repeating, arose on direct appeal and involved a seriously defective guilty plea proceeding (conducted just two weeks after the effective date of the 1966 amendments to Rule 11) in which the trial judge, in disregard of the Rule, had not even ascertained whether the defendant understood the charges against him. The "automatic reversal" remedy adopted by the Court was designed in large part to ensure scrupulous adherence to the new rule, which worked major, salutary changes in the plea-taking process in the federal courts by requiring personal interrogation of the defendant, on the record, about the voluntariness of and factual basis for his guilty plea.[17] The Court emphasized,

---

[17] The Court observed (394 U.S. at 465; footnote omitted):

> [T]he procedure embodied in Rule 11 * * * is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is

however, that its decision was "based solely upon our construction of Rule 11 and * * * our supervisory power over the lower federal courts," rather than upon the Constitution. *McCarthy* v. *United States*, *supra*, 394 U.S. at 464. See *United States* v. *Watson*, 548 F.2d 1058, 1062 n.7 (D.C. Cir. 1977). Moreover, although the Court remarked that "prejudice inheres in a failure to comply with Rule 11" (394 U.S. at 471), it did not suggest that such prejudice—which was defined merely as "depriv[ing] the defendant of the Rule's procedural safeguards" (*ibid.*)—was of a magnitude sufficient to warrant habeas corpus relief. Indeed, strong evidence that the Court did not consider every plea entered in violation of Rule 11 to be fundamentally unfair is supplied by its decision not to apply *McCarthy* retroactively because of "the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11." *Halliday* v. *United States*, 394 U.S. 831, 833 (1969).[18]

---

truly voluntary * * * [and] is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

[18] In declining to hold *McCarthy* retroactive, the Court carefully drew a distinction between the remedies available for a violation of the Rule and for an involuntary guilty plea (*Halliday* v. *United States*, *supra*, 394 U.S. at 833):

> [A] defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction.

Hence, whatever the wisdom of continuing to reverse convictions on direct appeal, without a showing of prejudice, in order to encourage judges to comply precisely with the procedures outlined in Rule 11,[19]

---

[19] Even on direct appeal, there is much to commend the view that the "automatic reversal" rule announced in *McCarthy* for every violation of Rule 11 has outlived its usefulness and that the harmless error rule of Fed. R. Crim. P. 52(a) should be applied to inconsequential Rule 11 violations. See *United States* v. *Scharf*, 551 F.2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F.2d 962, 966 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977). But see, *e.g.*, *United States* v. *Palter*, 575 F.2d 1050 (2d Cir. 1978); *United States* v. *Adams*, *supra*, 566 F.2d at 964-965. Trial judges are now aware of their obligations under Rule 11, and reversals because of what are at most isolated and inadvertent errors in accepting a guilty plea no longer serve a substantial didactic function. What is more, the 1975 amendments to Rule 11 have added substantial baggage to a rule that previously had been limited to a few considerations essential to the establishment of a knowing and intelligent plea. Rule 11(c)(5), for example, now requires the court to inform a defendant "that if he pleads guilty * * * the court may ask him questions about the offense * * *, and if he answers these questions under oath * * *, his answers may later be used against him in a prosecution for perjury * * *." The Court certainly did not have this type of requirement in mind when it stated in *McCarthy* that "prejudice inheres in a failure to comply with Rule 11" (394 U.S. at 471), yet the lower courts have not hesitated to set aside convictions in reliance on *McCarthy* because of noncompliance with this portion of the rule. See *United States* v. *Boatright*, 588 F.2d 471 (5th Cir. 1979); *United States* v.

violations of the Rule do not present a circumstance in which "the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Hill* v. *United States*, *supra*, 368 U.S. at 428. A trial judge's failure to mention the mandatory special parole term during the Rule 11 proceeding normally will be immediately obvious to the defendant upon imposition of sentence, especially if his ignorance of the special parole requirement truly played a meaningful role in his decision to plead guilty. When the period of special parole is announced, the defendant (if his later allegations are in fact true) should be instantly aware that he has been given a more severe sentence than he anticipated could be imposed. It is not unreasonable to hold that the remedy in that situation should be a timely motion to withdraw the plea under Fed. R. Crim. P. 32(d) or a direct appeal of the conviction.

Finally, even if the court of appeals' holding were not wholly inconsistent with the traditional limitations on the scope of collateral attack,[20] it would be

Boone, 543 F.2d 1090, 1092 (4th Cir. 1976). See also *United States* v. *Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977); *United States* v. *Journet*, 544 F.2d 633, 636-637 (2d Cir. 1976).

[20] The court's conclusion that Section 2255 relief is necessary to "motivate strict compliance with Rule 11 in the future" (Pet. App. 12a) detaches the writ of habeas corpus from its historical moorings. The sole function of the writ is to test "the legality of the detention of one in the custody of another" (*McNally* v. *Hill*, 293 U.S. 131, 136 (1934); see also *Blackledge* v. *Allison*, *supra*, 431 U.S. at 72; *Harris* v. *Nelson*, 394 U.S. 286, 290-291 (1969)), not to establish prophylactic

unwise to extend the "automatic reversal" rule of *McCarthy* to Section 2255 proceedings, where the benefit of allowing review of Rule 11 errors "is small in relation to the costs." *Stone* v. *Powell*, *supra*, 428 U.S. at 493. Permitting a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceedings for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution n the underlying offense may be difficult or impossible. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13; *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 109; *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir.), cert. denied, 374 U.S. 857 (1963).[21] The government's inability to retry a defendant who has obtained collateral relief (see page 25, *supra*) is even more likely to occur when the first conviction was based on a guilty plea, because of the lack of a trial

rules for the sound administration of the criminal law. A defendant, such as respondent, whose guilty plea was not influenced in any way by the district court's technical noncompliance with a rule of criminal procedure can hardly be said to be detained unlawfully.

[21] The court of appeals frankly acknowledged that "our decision 'erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free'" (Pet. App. 11a, quoting *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 109).

transcript. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, *supra*, 38 U. Chi. L. Rev. at 147. In sum, as the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

Here, for example, it should have been obvious to respondent (and his counsel) at sentencing that the trial judge had neglected to mention the special parole requirement during the Rule 11 proceeding. Yet respondent's unexplained delay of almost two years in raising his objection will, if the court of appeals' decision is not overturned, require the government to reprosecute a complicated conspiracy case long after the occurrence of the criminal conduct, a task made especially burdensome by the fact that respondent's plea allowed him to avoid trial with his co-defendants. See *United States* v. *Barker*, 514 F.2d 208, 222 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975).[22]

These important concerns would be seriously undermined if every violation of Rule 11, no matter how inconsequential, justified Section 2255 relief.[23] In-

[22] Twenty-two defendants were indicted in this case; 11, including respondent, pleaded guilty; five defendants were found guilty by a jury.

[23] The same concerns prompted the Court not to apply *McCarthy* retroactively, even to Rule 11 errors presented on direct appeal. See *Halliday* v. *United States*, *supra*, 394 U.S. at 833.

deed, as we have already noted (see page 33, note 19, *supra*), the problem will be exacerbated by the 1975 amendments to the Rule, which expand substantially the range of subjects on which a trial judge must advise a defendant before accepting his guilty plea. See Fed. R. Crim. P. 11(c)(1)-(5). More than 80% of all federal criminal convictions follow pleas of guilty,[24] and minor deviations from Rule 11 are inevitable in a not insignificant number of these cases. The strong societal interest in the finality of judgments suggests that, unless a violation of the Rule materially influenced the defendant's decision to plead guilty or would otherwise lead to "a complete miscarriage of justice," the technical error should be raised on direct appeal or not at all.

[24] In fiscal year 1977, 35,335 of the 43,248 federal convictions, or 81.7%, followed pleas of guilty. In fiscal year 1976, the figures were 33,327 out of 40,975, or 81.3%. Source: *1977 Annual Report of the Director of the Administrative Office of the United States Courts*, Table 38, at p. 143.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENNETH S. GELLER
Assistant to the Solicitor General

KATHERINE WINFREE
Attorney

FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 297512 342